

29th November 1752.

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N
O F

ARTHUR STRAITON of *Kirkside*,
Pursuer,

106.

A G A I N S T

JOHN FULLARTON of *Kinnaber*, and Colonel
John Scot of Commiston, Defenders,

Humbly sheweth,

THAT your Petitioner and his Predecessors stand infeft in the Church Lands of *Ecclegreig*, commonly called *Kirk-side*, with the Teind-sheaves thereof included, "with the Salmon-fishing in the Sea, within the Marches of the said Lands, with the Tiends thereof included, lying in the Parish of *Ecclegreig*, and Shire of *Kincardine*," for several hundred Years backwards, by virtue of Feu Charters granted by the *Prior and Convent of St. Andrews*; and he produces a Charter, granted to his Ancestor, 1st August 1581, and which 1st Aug. 1581.
Lands and Fishing he now holds of the Crown, as come in place of the *Prior*; and 'tis proved, that by virtue of those Rights, your Petitioner and his Predecessors have immemorially possess a Salmon-fishing in the Sea, opposite to the fore-said Lands of *Kirkside*, as far South as where a Line drawn from the House of *Kirkside*, thro' the Wynd Path, (a Cart Road

Road that goes down from the House of *Kirkfide* thro' high Rocks that extend a great Way from South to North along the Sea-coast) touches the Sea, and that during the ebbing and the flowing of the Sea, from the high Water Mark to its lowest Ebb.

That, on the other hand, Mr. *Fullarton* of *Kinnaber*, and Colonel *Scot* of *Commiston*, are infest each of them in a Half of that Salmon-fishing upon the Water of *Northesk*, adjacent to and within the Bounds of the Lands of *Wardropeton*, which Lands belong in Property to Colonel *Scot*, and lye within the Shire of *Kincardine*.

That tho' the Lands of *Wardropeton* lye to the Southward of your Petitioner's Lands of *Kirkfide*, and march with them both above the foresaid Ridge of Rocks, and below the same, downward to the Sea; yet your Petitioner had no Occasion to know, or to be concerned about the Right or Possession of the Salmon-fishing in the River *Northesk*, within the Marches of the Lands of *Wardropeton*, because that River emptied itself into the Sea within the Bounds of the foresaid Lands of *Wardropeton*, a great Way to the Southward of your Petitioner's Lands of *Kirkfide*; and as the Heretor of *Wardropeton* had no Right to a *Sea-fishing*, it was not possible that there should be any interfering between your Petitioner's Fishing in the Sea, and the Fishing in the River within the Bounds of the Lands of *Wardropeton*; but that of late the Sea having cast up great Banks of Sand opposite to that Place where the Water of *Northesk* was in use to empty itself into the Sea, thro' the Lands of *Wardropeton*, turned the Course of the River Northwards, whereby it now empties itself into the Sea, at high Water, almost opposite to the Wynd-path, where your Petitioner was immemorially possess'd of a Fishing in the Sea, and the River, at ebb Tide or low Water, empties itself into the Sea a great Way further Northward.

That the Defenders, in consequence of this Alteration of the Course of the River, not only possess the Salmon-fishing,



so far as this new Course of the River was within the Lands of *Wardropeton*, and where, in the highest Tides, the Course of the River is still distinguishable; for, tho' it be considerably enlarged, yet the Banks of the River appear on both Sides, and this reaches as far North as the Line thro' the Wynd-path; and so far your Petitioner had no Interest: But further, they followed their Fishing into the Sea, within the Bounds of your Petitioner's Fishing, as far North as where the River enters into the Sea at low Water; and this not at low Water, when the River, by reason of its Shallowness, is not fishable by Coble or Net, the only Method of fishing used by the Defenders, but also in the flowing of the Sea, and in the ebbing of the Sea, when the River is absorbed by the Sea, clearly within the Bounds of your Petitioner's *Sea-fishing*: And further, the Defenders proceeded not only to encroach upon your Petitioner's Fishing, but also *via facti* dispossessed your Petitioner of his Sea-fishing upon the Coast adjacent to his Lands, as far North as the Entry of the River into the Sea at low Water extends.

That, upon this Occasion, your Petitioner applied to the Sheriff of *Kincardine*, for his Interposition for your Petitioner's Protection against this Encroachment upon the Fishing, and the violent dispossessing of his Fishers, as both your Petitioner's Lands of *Kirkfide*, and the Lands of *Wardropeton*, and the Salmon-fishings of *Wardropeton*, in the Right whereof the Encroachment was made upon your Petitioner's Fishing, lye within the Shire of *Kincardine*; and the Sheriff, after Notice given to the Defender, allowed your Petitioner to prove his Possession; and your Petitioner having proved immemorial Possession of the Fishing upon the Sea opposite to his Lands, from the Wynd-path Eastward, exclusive of all others, the Sheriff, by his Decree of the 3d *August* 1748, " Found it proven, that your Petitioner was in the peaceable Possession of
 " the Fishing libelled, at the Time libelled, and some Years
 " before, and that the Persons complained of interrupted the
 " Complainer in his said Possession, and *violently* took Possession
 " them-

“ themselves; and therefore decerned and ordained the said
 “ *John Fullerton* and *John Scot*, to cede and again yield up
 “ the Possession of the said Fishing to the Complainer be-
 “ twixt and the 13th *August* then instant, under the Penalty of
 “ 20 *l. Sterling*, to be paid by them to the said *Arthur*
 “ *Straiton*; and decerned and ordained the saids *John Fuller-*
 “ *ton* and *John Scot* not to disturb the Complainer in his Pos-
 “ session in Time coming, under the Penalty of 5 *l. Sterling*
 “ *toties quoties*, without Prejudice to the Complainer to insist
 “ for his bygone Damages as accords, and without Prejudice
 “ to the Defenders to declare their Right to the said Fishings
 “ as accords.”

That the Pursuer duly intimated this Interdict upon 15th
August 1748 to the said Defender Mr. *Fullerton*, being perso-
 nally present, and upon the 16th of the said Month, to the
 Overseer of the Defender Colonel *Scot's* Fishings, under Form
 of Instrument, which had no Success, for they not only con-
 tinued their Incroachment, but violently and masterfully dis-
 turbed and hindered the Pursuer from fishing in terms of the
 Interdict.

That the Pursuer complained of this Violence and Contempt
 of Authority to the Sheriff, but without Success; possibly the
 Sheriff apprehended, that the Defenders and their Fishers would
 be too many, and too strong for him and the Law, as well as
 they had been for your Petitioner, and thereby your Petitioner
 had no other Remedy left him, for recovering and maintaining
 his Possession, but by bringing a *Declarator* of his Right and
Molestation before your Lordships.

That this Action came by Course of the Roll before the
 Lord *Kilkerran* Ordinary, and his Lordship having reported
 the Case to your Lordships, your Lordships were pleased, up-
 on the 8th *July* last, to pronounce the following Interlocutor, viz.
 “ On Report of the Lord *Kilkerran*, the Lords find, that *John*
 “ *Fullerton* of *Kinnaber*, and *John Scot* of *Commiston*, Defen-
 “ ders, have Right, in virtue of their several Grants, to fish
 “ in

“ in the River of *Northesk*, notwithstanding of its changing its
 “ Course, ’till they come to the *biggest Flood Mark*, where the
 “ Sea touches the Land, along the Shore; and find, that *Ar-*
 “ *thur Straiton* of *Kirkside*, Pursuer, has Right to the Fishing
 “ within the highest Flood Mark, at all Times, whether the
 “ Sea be covering a Part of the said River or not; and find,
 “ that each Party has accordingly a Right, exclusive of the o-
 “ ther, and remit to the Lord Ordinary to proceed accordingly.”

That the Defenders having reclaimed, and Answers having
 been given in for your Petitioner, your Lordships, upon the
 18th *November* current, were pleased to pronounce the fol-
 lowing Interlocutor, viz. “ The Lords having advised this Pe-
 “ tition, with the Answers thereto, and additional Petition for
 “ *John Fullerton* of *Kinnaber*, and Colonel *John Scot* of *Co-*
 “ *miston*, find, that the Defenders, notwithstanding the Change
 “ of the Channel of the River, have Right to fish down to the
 “ *lowest Flood Mark*; but find, that the Pursuer, in Right of
 “ his Infeftment in the Fishing of the Sea, has a joint Right of
 “ fishing with the Defenders above the lowest Flood Mark,
 “ when the River is covered by the Sea, opposite to his Lands
 “ of *Kirkside*, so long as the River occupies a Channel oppo-
 “ site to the said Lands; and remit to the Lord Ordinary to
 “ proceed accordingly, and to hear Parties upon the Limits of
 “ their several Lands, and to do therein as he shall see Cause.”

Your Petitioner hopes he shall be forgiven to reclaim in his
 Turn, more especially, that it is not contested, that his Rights
 and Infeftments give him the sole and exclusive Right of fish-
 ing upon the Sea adjacent or opposite to his own Lands, nor
 that he hath immemorially possess the said Fishing accordingly;
 and as he is not informed, that it is agreeable to the Rules of
 our Law, that a feudal Right of Property, for so he may be
 allowed to call a Right of Salmon Fishing, is *extinguishable* in
 whole or in Part by any Accident whatsoever, that leaves the
 Subject of his Fishing capable of its being possess, and particu-
 larly, that where the Right of Fishing is on the Sea, that the

Accident of a Water, whether greater or lesser, its running into the Sea, over which he has a Right of Fishing, cannot hurt or exclude his Right.

And in the Entry your Petitioner will be allowed to observe, in Point of Fact, in order that your Lordships may have a distinct View of the Question between the Parties, that the Petitioner affirms, that the River of *Northesk* remains a *River*, with Banks on each Side, even at full Sea, till it comes opposite to your Petitioner's Fishing, in a direct Line, through the *Wynd-path*; and it is only to the Northward of the *Wynd-path*, that the River is absorbed by the Sea at full Water; and in that Place, it is gradually absorbed by the Sea, from the Time it begins to flow, as there the Banks of the River, on each Side, are very little higher than the adjacent Sands, and therefore it was but a wilful perplexing of the Question, when the *Defenders* in their Petition asserted, that the Interlocutor of the 8th *July* gave your Petitioner a more extensive Right than his Intestments, as if the highest Flood Mark, within which the Pursuer, your Petitioner, is allowed to fish by that Interlocutor, had been without the Bounds of his own Lands, which is not the Case, as the River continues a River till it comes opposite to the *Wynd-path*.

But 2dly, to prevent all Dispute on this Head, your Petitioner agrees, that the Purport of his Declarator is only, that he hath the exclusive Right of Fishing upon the Sea, at all Times of the Tide, from the low Ebb to the highest Tide, in a direct Line Northward from the *Wynd-path*, as far as his Lands go, and that he claims no Right to fish upon the Seashore, Southward of his own Lands, and even no further South than the Line from the *Wynd-path*.

And more particularly, your Petitioner is advised, that as a Right of *Salmon Fishing*, whether in a River or in the Sea, is *inter regalia*, and it depends upon the Tenure of the Crown's Grant, what is the Extent of any Salmon Fishing, that therefore, in the present Case, there cannot possibly be an Interfer-

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ing between the Pursuer and the Defenders, for it will be considered, that the Salmon Fishing upon the *River of Northesk*, in respect whereof the Defenders pretend to interfere with your Petitioner, is the Salmon Fishing upon the said River, within the Bounds of the Lands of *Wardropeton*. This is the lowest Fishing on the River, next to the Sea, of which each of the Defenders have one Half; and in consequence of this Fishing, common to both the Defenders, they jointly pretended to encroach upon, and to disturb your Petitioner in his Sea Fishing, opposite to his own Lands.

This Fishing is granted to Colonel *Scot*, in the most ancient Charter produced for him, in the following Terms: "*Cum dimidio istius piscationis salmonum juxta et infra bondas predict. terrarum de Wardropeton, cum omnibus libertatibus, et privilegiis eisd. spectant.*" referring to this and the other Fishings in the same River granted by the Charter.

And in like Manner, in *Kinnaber's* Charter, this Fishing is expressed thus; "*Et totas et integras piscationes, et salmonum piscationes, cum pertinen. dict. Joannis Fullerton de Kinnaber, in aqua de Northesk, ad dimiditatem terrarum de Wardropeton, per prius pertinen. jacen. infra vice-cometatum nostrum de Kincardine.*"

Now, as this Fishing of *Wardropeton* appears originally to have been granted to the Heretor of *Wardropeton*, and one Half appears to have been retained by the Heretor of *Wardropeton*, by Colonel *Scot* the present Heretor and his Predecessors, and the other Half to have been disposed to *Fullerton* of *Kinnaber*; and as it appears plainly to be limited by the Lands of *Wardropeton*, it appears, with Submission, impossible, that it can extend further than the Limits of the fore-said Lands, either up or down the River, or that it can interfere with a Fishing granted to your Petitioner not within the Bounds of the Lands of *Wardropeton*, but opposite to the Bounds of the Petitioner's Lands. Your Petitioner is advised, that such a limited Right of Salmon Fishing would exclude
the

the acquiring a Fishing not adjacent to, or within the Bounds of the Lands of *Wardropeton*, but without the same, even by a positive Prescription. The Defenders have a *bounding Charter*, which excludes all Acquisition by Prescription without the Bounds of their Charter. Your Petitioner is advised that this is an established Maxim in a bounding Charter of Lands, and that it concludes *a fortiori* to a bounding Charter of a Salmon Fishing, which does not pass as a Pertinent; especially that it is not pretended that *Wardropeton* is erected into a Barony.

Neither have the Defenders any Ground of Complaint, as if they had lost a Part of this Fishing by the Change of the Course of the River, when it passes through the Lands of *Wardropeton*, though even such a Change would not entitle them to encroach upon your Petitioner's Fishing opposite to his own Lands, (as shall be shown more particularly in the Sequel,) when your Lordships have observed that the River runs a longer Course now through these Lands than it did formerly, when it ran almost streight East through a Corner of these Lands into the Sea, as appears by a Map thereof produced, taken by Mr. *Adair* by publick Authority; whereas now the River runs through these Lands double the Space, when it runs through the whole Length of the Lands of *Wardropeton*, from the South until it enters into the Sea at high Water opposite to your Petitioner's March.

And your Petitioner is advised, that the Decision of the House of Peers, mentioned from the Bench, in the Case between the Earl of *Murray* and the Duke of *Gordon*, is in Point, and concludes *a fortiori* to the present Case. The Earl of *Murray*, and the other Respondents in that Case, set furth, " That they
 " had an undoubted Right to the Salmon Fishing in the River
 " of *Spey*, *without any Limitation*, and had accordingly been
 " in the constant Possession of exercising that Right of Salmon Fishing in that River as far down as the River can be
 " said to go, *i. e.* to the Place where the River or *fresh Water*
 " falls into the Sea *at the lowest Ebb* of the Tide; that the

" Duke

“ Duke of *Gordon* pretended to an antient Right of Salmon
 “ Fishing, called a Tug-net Fishing, in the *Sea* or *Salt Water*
 “ at the Mouth of the said River of *Spey*.” The Decision in
 that Case was the same that your Lordships pronounced in this
 Cause upon the Report ; finding the Defenders had Right to
 fish in the River till the highest Flood Mark, and finding that
 your Petitioner hath Right to the Fishing within the highest
 Flood Mark, whether the Sea be covering a Part of the said
 River or not, and that their Rights were exclusive of each o-
 ther.

This Decision concludes *a fortiori* to the present Case, where
 the Defender's Fishing in the River is not without *Limitation*,
 which was the Case of the Earl of *Murray's* Fishing upon the
Spey, but is clearly and expressly *limited*, “ to be adjacent to
 “ and within the Bounds of the Lands of *Wardropeton* ;”
 wherefore, as the Petitioner claims no Fishing within the
 Bounds of the Lands of *Wardropeton*, but only upon the Sea,
 in Terms of his Charter, he humbly hopes the last Interlocu-
 tor will be reversed, and the Interlocutor pronounced upon
 Report will be affirmed.

And the only Thing that gave occasion of Doubt at the
 pronouncing the last Interlocutor, was, with Submission, a
 willful mistating of the Defender's Right, under Colour of
 which they pretended to encroach upon the Petitioner. They
 set forth, “ That *Kinnaber* stood in the Lands of *Kinna-*
 “ *ber, cum piscationibus salmonum, aliorumque piscium, in aqua*
 “ *de Northesk, tam infra fluxum maris, quam extra eundem,*
 “ *in quavis parte dictæ aquæ, ex adverso dict. terrarum et ba-*
 “ *roniæ de Kinnaber* ; and they subsumed that *Kinnaber* had
 “ Right to the Salmon Fishing in the River of *Northesk, tam*
 “ *infra fluxum maris quam extra eundem* ; which, (say the
 “ Defenders) must give them Right to fish the River within
 “ the Sea to the lowest Ebb ; and therefore, now that the
 “ River enters the Sea within the Petitioner's Fishing, they
 “ must have Right to follow the same ;” and if your Petition-

er is not much mistaken, this Charter of *Kinnaber's* had the chief Influence in varying the Interlocutor.

But, with great Submission, this is a mere Illusion. This Fishing granted to *Kinnaber* in the River, opposite to the Lands and Barony of *Kinnaber*, can never interfere with or give Right to encroach upon your Petitioner's Fishings opposite to his own Lands; and that not only because this is a bounded Fishing, limited to that Part of the River which is opposite to the Barony of *Kinnaber*, and no Part whereof touches your Petitioner's Lands, but lies a good way up the River; but chiefly, because both the Defenders, *Kinnaber* and Colonel *Scot*, have Right to another Fishing in this River below the Barony of *Kinnaber*, viz. the Fishing on the Lands of *Wardropeton*, which lies between the Barony of *Kinnaber* and the Mouth of the River, where it empties itself into the Sea; and therefore, unless they could destroy the Lands of *Wardropeton*, and sink the Fishing of *Wardropeton*, of which each of the Defenders have Right to a Half by their Charters above recited, it is impossible that this Fishing, opposite to the Barony of *Kinnaber*, can interfere with, or give *Kinnaber* a Right to disturb the Petitioner's Sea Fishing opposite to his own Lands.

And this also serves to explain the Clause in *Kinnaber's Charter*, *tam infra fluxum maris quam extra eundem*, that it cannot mean a Fishing in the Sea, which is impossible in any Fishing lying opposite to the Lands and Barony of *Kinnaber*, which, as hath been said, hath the Lands of *Wardropeton* interjected between that Barony and any Part of the Sea, so that the Meaning of this Clause can only be, that the Salmon-fishing of the Barony of *Kinnaber* in this River, comprehends not only that Part of the River where the Tide flows within the Barony, but also further up the River where the Tide doth not reach.

The Petitioner might add on this Head real Evidence, that occurs in the present Case, that it is not in consequence of this Fishing of *Kinnaber's*, that the Incroachment is made upon the

Peti-

Petitioner by the Defenders. Colonel *Scot* hath no Right to this Fishing in the *Barony of Kinnaber*; it belongs to *Kinnaber* alone; and yet 'tis in respect of a joint Fishing that the Defenders have on the River, that they jointly interrupt him; and this is none other than the Fishing of *Wardropeton*, within the Bounds of these Lands, which is the only Fishing in the River in which the Defenders have a joint Right; and this at the same Time demonstrates the Impropriety of giving Colonel *Scot* a Right to interfere with the Petitioner's Fishing, in respect of *Kinnaber's Fishing* upon the River, within his Barony as is done by the Interlocutor complained of.

Add to this, that all the Fishings granted to *Kinnaber* in his Infeftments, except the half Fishing within the Bounds of the Lands of *Wardropeton*, are described as lying within the Shire of *Forfar*, and that therefore it is not easily to be conceived, how these Fishings of *Kinnaber's* should intitle him to fish opposite to your Petitioner's Lands in the Shire of *Kincardine*, especially that the Lands of *Wardropeton*, and Fishing within the Bounds thereof, belonging to both Defenders, interjected between your Petitioner's Fishing and the Barony of *Kinnaber*, lye in the Shire of *Kincardine*, and are so described in both the Defenders Infeftments.

The Defenders also, in order to perplex the Cause, founded upon another Fishing granted to *Kinnaber*, by his Infeftment, in these Words, "*et etiam piscationes Salmonum, aliorumque piscium, super littore maris inter dictam aquam de Northesk et Southesk, jacen. infra comitatum nostrum de Forfar*; which say the Defenders, gives them a Right to fish in the Sea as far North as the River of *Northesk* now runs."

But this again is disguising the Matter. This is a Fishing granted to *Kinnaber* only, and in this Fishing Colonel *Scot* has not the Colour of an Interest; and therefore 'tis impossible that it can give to the Colonel any Right to fish upon the Sea, or to incroach upon your Petitioner's Fishing in the Sea, opposite to his own Lands, as is found by the Interlocutor complained

plained of; for as has been frequently mentioned above, the only common Fishing to both Defenders is the Fishing in the River within the Bounds of the Lands of *Wardropeton*.

But, 2dly, even with respect to *Kinnaber*, it hath been observed above, that the River *Northesk*, till of late, entered the Sea a great way to the Southward of your Petitioner's Lands, within the Bounds of the Shire of *Forfar*, and therefore *Kinnaber's* Grant of the Sea Fishing was limited on the North with the Course of the Water of *Northesk*, as it then run into the Sea, within the Shire of *Forfar*, and therefore your Petitioner cannot conceive, how this Sea Fishing of *Kinnaber's*, should be extended Northward, thro' all the Lands of *Wardropeton*, which confessedly lies in the Shire of *Kincardine*, and thro' your Petitioner's Sea Fishing lying still further North in the same County.

X And to illustrate this, suppose the Crown had granted the Sea Fishing to the Northward of the River of *Northesk* to any Subject, at the same Time that this Sea Fishing, on the South of the River, was granted to *Kinnaber*, would not the Grant of the Sea Fishing to the North of the River have been equally effectual, as *Kinnaber's* Grant on the South? and as the River's turning 'tis Course Southward, would not have diminished *Kinnaber's* Right upon that Part of the Sea contained in his Grant, so neither could the River's changing its Course Northward, augment *Kinnaber's* Right, or diminish the Grant of the Crown in favours of the other, which was not at all connected with the Course of the River, tho' it was made use of as a Description of that Part of the Sea, over which each of the Parties Right extended.

X And your Petitioner is advised that the Rule of Law would be the same, supposing the Sea Fishing to the North of the River had been granted to no Body, but had remained with the Crown. *Kinnaber* would have had no Right to usurp upon the Crown's Right of Salmon Fishing, more than upon the Right of his fellow Subject; and as it cannot be denied but that

that the Salmon Fishing on the Sea lying to the Northward of the River, as it then run into the Sea, was not granted to *Kinnaber*, so it must have remained with the Crown.

And here, in passing, your Petitioner will be allowed to observe, that the Defenders argue inconsistently. They plead, that if a Fishing in a River is granted to a Party, *within the Bounds of his own Lands*, that if the River should change its Course, and break in through another Man's Lands, that the Proprietor of the Fishing might follow the River into its new Channel, tho' without his Bounding; because the Fishing had no Relation to the Lands, but only to the Body of the River. This, the Petitioner is advised, is erroneous in point of Law; because, in such a Case, the Grant is limited to the River, as it runs within the Lands; and it is not indefinite over such a Space of the River. But, supposing the Argument to be conclusive doth it not conclude, *a fortiori*, to the present Case, that where the Fishing is granted over a certain Body of the Sea, lying to the Southward or to the Northward of a particular River, that the Variation of the Course of the River will not vary, will not extend or diminish the Extent of this Fishing over the Sea?

But to proceed; as your Petitioner had a Grant of the Salmon Fishing in the Sea, opposite to his Lands, long prior to any Grant of the Fishing in the Sea in favours of *Kinnaber*, so far as appears; and as *Kinnaber's* Grant is limited to that Part of the Sea that lay South of the River *Northesk*, which was about Half a Mile South of your Petitioner's Lands, it is not easily to be conceived, how the Change of the Course of the River *Northesk* should make the Crown's Grant in favours of *Kinnaber* to be so construed, as to make it an illegal Grant, an Incroachment upon the Petitioner's Salmon Fishing, of which the Crown was *ab ante* habily denuded in favours of your Petitioner.

From what has been said it is apparent, that the Defenders have, during the whole Course of this Argument, pleaded very improperly. They say, that the *Defenders* have their Lands on both Sides of the River, quite down to the Sea. This your

Lordships perceive is fallacious. The Lands of *Wardropeton*, belonging to Col. *Scot*, reach down to the Sea; but the Lands belonging to the other Defender *Kinnaber*, are further up the River, having the Lands of *Wardropeton* interjected between them and the Sea.

Again, they plead upon *Kinnaber's* Fishing, *tam intra quam extra fluxum maris*, as if this belonged also to the other Defender Colonel *Scot*; whereas your Lordships have heard, that he hath no Right or Interest in this Fishing whatsoever, and that *Kinnaber's* Lands with which this Fishing is bounded, tho' it bears the Fishing to be *tam intra fluxum maris quam extra eundem*, yet cannot extend the Fishing bounded with his own Lands down to the Sea, because the Lands of *Wardropeton* are interjected between the Lands of *Kinnaber* and the Sea.

And with respect to the Account that the Defenders give of their own and the Petitioner's Fishings, the Petitioner hath no Access to know with Certainty the Benefit arising to the Defenders from their Fishings, as they have many other Fishings in the River and upon the Sea, that lye at a Distance from your Petitioner's Fishing. This he can aver with Certainty, that the Change of the Course of the River hath made no extraordinary Variation in his Salmon Fishing; tho' for several Years past, there has been a remarkable Increase in all the Salmon Fishings in *Britain*, yet, so far as he can discover, the Increase has not been greater in his Fishing, than in Proportion to the other Salmon Fishings in this Country, and particularly in his Neighbourhood; and therefore he hath nothing that he can justly charge to the Change of the Course of the River.

But whatever be in this Fact, your Petitioner is advised, that if he hath Right to a small Salmon Fishing in the Sea, opposite to his small Estate, and that the Defenders, who have much greater Estates, and many more Salmon Fishings than he has, it does not from thence follow, that this gives the Defenders a Title, either to encroach upon him, or to swallow up his small Fishing. The Parable of the rich Man, with the many Flocks, and the poor Man's Lamb, applies directly to this Argument.

And

And as to the Demand made, that the Defenders should be allowed, in this Cause to try the Rights and Possession of Fishings belonging to other Heretors upon the River *Southesk*, and upon the Rivers *Dee* and *Don*, in order to determine this Cause, your Petitioner is advised it is an extraordinary Demand. This Right, and the Right of the Defenders, fall to be tried and determined by the Grants from the Crown, and by the Possession had thereon, and not upon the Rights of others, which must be different according to the Diversity of their Grants and of their Possessions. Your Petitioner is advised, that he hath no Title to call for the Production of the Rights of Salmon Fishing competent to the Proprietors of such Fishings on other Rivers, that he cannot know; nor can he be bound to prove their Possession; and yet these Things would be necessary, before it could appear, whether their Right and Possession could have any Influence in the present Cause. If such Heretors Rights had been tried in this Court, in a Cause where there were more Parties, your Petitioner believes it might be competent for either Party to found on the Judgments of this Court; but that another Cause should be tried, in order that the Decision therein might have Influence in the Decision of a Cause presently depending, appears to the Respondent to be without all Precedent.

May it therefore please your Lordships, in respect of the Premises, to alter your Interlocutor of the 18th November current, and to adhere to your Interlocutor of the 5th July last, and to find that your Petitioner hath the exclusive Right to the Fishing upon the Sea opposite to his own Lands within the Flood Mark, at all Times, and that his Right is not impaired by the Alteration of the Course of the River Northesk, and that he hath Right to fish upon the Sea within the Bounds aforesaid, whether the Sea be covering a Part of the said River or not, and to remit to the Lord Ordinary to proceed accordingly.

According to Justice, &c.

ROB. CRAIGIE.

ROB. CRAIGIE.